

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMERICAN RADIO SYSTEMS
CORPORATION and
EZ COMMUNICATIONS, INC.,

Defendants.

No. 97 0405

WHEREAS, plaintiff, the United States of America, having filed its Complaint herein on February 27, 1997, and defendants American Radio Systems Corporation (“ARS”) and EZ Communications, Inc. (“EZ”), by their attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any issue of law or fact herein;

AND WHEREAS, the purpose of this Final Judgment is prompt and certain divestiture of certain assets to assure that competition is not substantially lessened;

AND WHEREAS, plaintiff requires defendants to make certain divestitures for the

purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, defendants have represented to plaintiff that the divestitures ordered herein can and will be made and that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

I. JURISDICTION

This Court has jurisdiction over each of the parties hereto and over the subject matter of this action. The Complaint states a claim upon which relief may be granted against defendants ARS and EZ, as hereinafter defined, under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

II. DEFINITIONS

As used in this Final Judgment:

A. “ARS” means defendant American Radio Systems Corporation, a Delaware corporation with its headquarters in Boston, Massachusetts, and includes its successors and assigns, its subsidiaries, and directors, officers, managers, agents and employees acting for or on behalf of ARS.

B. “EZ” means defendant EZ Communications, Inc., a Virginia corporation with its headquarters in Fairfax, Virginia, and includes its successors and assigns, its subsidiaries, and directors, officers, managers, agents and employees acting for or on behalf of EZ.

C. “KSSJ-FM Assets” means all the assets, tangible or intangible, used in the

operation of KSSJ 101.9 FM radio station in the Sacramento Area, including but not limited to: all real property (owned or leased) used in the operation of the station, all broadcast equipment, personal property, inventory, office furniture, fixed assets and fixtures, materials, supplies and other tangible property used in the operation of that station; all licenses, permits, authorizations and applications therefor issued by the Federal Communications Commission (“FCC”) and other governmental agencies relating to the station; all contracts, agreements, leases and commitments of defendants pertaining to that station and its operations; all trademarks, service marks, trade names, copyrights, patents, slogans, programming materials and promotional materials relating to that station, and all logs and other records maintained by defendants or that station in connection with its business.

D. “Sacramento Area” means the Sacramento, California Metro Survey Area as identified by The Arbitron Radio Market Report for Sacramento (Fall 1996), which is made up of the following counties: El Dorado, Placer, Sacramento and Yolo.

E. “Acquirer” means the entity to whom defendants divest the KSSJ-FM Assets or the Optional ARS Station Assets under this Final Judgment.

F. “ARS Radio Station” means any radio station owned by ARS or EZ and licensed to a community in the Sacramento Area, other than KSSJ-FM.

G. “Non-ARS Radio Station” means any radio station licensed to a community in the Sacramento Area that is not an ARS Radio Station.

H. “Optional ARS Station Assets” means the full class B FM radio station assets designated by plaintiff pursuant to Section IV (B) of this Final Judgment, and include all the assets, tangible or intangible, used in the operation of any one radio station with a full class B

license broadcast facility owned by ARS or EZ, so chosen by the plaintiff, and licensed to a community in the Sacramento Area, other than KSSJ-FM, including but not limited to: all real property (owned or leased) used in the operation of that station, all broadcast equipment, personal property, inventory, office furniture, fixed assets and fixtures, materials, supplies and other tangible property used in the operation of that station; all licenses, permits, authorizations and applications therefor issued by the Federal Communications Commission (“FCC”) and other governmental agencies relating to that station; all contracts, agreements, leases and commitments of defendants pertaining to that station and its operations; all trademarks, service marks, trade names, copyrights, patents, slogans, programming materials and promotional materials relating to that station; and all logs and other records maintained by defendants or that station in connection with its business.

III. APPLICABILITY

A. The provisions of this Final Judgment apply to the defendants, their successors and assigns, their subsidiaries, affiliates, directors, officers, managers, agents and employees, and all other persons in active concert or participation with them who shall have received actual notice of this Final Judgment by personal service or otherwise.

B. Each defendant shall require, as a condition of the sale or other disposition of all or substantially all of the assets used in its business of owning and operating its portfolio of radio stations in the Sacramento Area, that the acquiring party or parties agree to be bound by the provisions of this Final Judgment; provided, however, defendants need not obtain such an agreement from an Acquirer in connection with the divestiture of the KSSJ-FM Assets or the Optional ARS Station Assets.

IV. DIVESTITURE

A. Defendants are hereby ordered and directed, in accordance with the terms of this Final Judgment, within six (6) months after the filing of the complaint in this action, or within five (5) business days after notice of entry of this Final Judgment, whichever is later, to divest the KSSJ-FM Assets to an Acquirer acceptable to plaintiff, in its sole discretion.

B. In the event that KSSJ-FM's class B FM license has not been issued by the FCC on or before December 31, 1997, plaintiff shall thereafter have the right, exercisable at any time during the term of this Final Judgment, to designate the Optional ARS Station Assets. Plaintiff's designation shall be communicated to defendants in writing, which notification shall identify one class B FM station and accompanying assets that shall constitute the Optional ARS Station Assets. In the event plaintiff designates the Optional ARS Station Assets pursuant to this Section IV(B), defendants shall, in accordance with the terms of this Final Judgment, within six (6) months of written notification to defendants of plaintiff's designation of the Optional ARS Station Assets, in addition to the KSSJ-FM Assets, divest the Optional ARS Station Assets to an Acquirer acceptable to plaintiff, in its sole discretion.

C. Unless plaintiff otherwise consents in writing, the divestiture pursuant to Section IV of this Final Judgment, or by the trustee appointed pursuant to Section V, shall include all the KSSJ-FM Assets and the Optional ARS Station Assets, and shall be accomplished in such a way as to satisfy plaintiff, in its sole discretion, that the KSSJ-FM Assets and Optional ARS Station Assets can and will be used by an Acquirer as a viable, ongoing commercial radio business. The divestiture, whether pursuant to Section IV or V of this Final Judgment, shall be made (1) to an Acquirer that, in the sole judgment of plaintiff, has the capability and intent of competing

effectively, and has the managerial, operational and financial capability to compete effectively as a radio station operator in the Sacramento Area; and (2) pursuant to agreements the terms of which shall not, in the sold judgement of plaintiff, interfere with the ability of the Acquirer to compete effectively.

D. Defendants agree to use their best efforts to divest the KSSJ-FM Assets and the Optional ARS Station Assets, and to obtain all regulatory approvals necessary for such divestiture, as expeditiously as possible. Plaintiff, in its sole discretion, may extend the time period for the divestiture set forth in Section IV (A) or Section IV (B), as the case may be, for two (2) additional thirty (30)-day periods of time, not to exceed sixty (60) calendar days in total in each case.

E. In accomplishing the divestiture ordered by this Final Judgment, defendants promptly shall make known, by usual and customary means, the availability of the KSSJ-FM Assets and the Optional ARS Station Assets. Defendant shall inform any person making a bona fide inquiry regarding a possible purchase that the sale is being made pursuant to this Final Judgment and provide such person with a copy of the Final Judgment. Defendants shall make known to any person making an inquiry regarding a possible purchase of the KSSJ-FM Assets and the Optional ARS Station Assets, that the assets described in Section II (C) and Section II (H) are being offered for sale. Defendants shall also offer to furnish to all bona fide prospective purchasers, subject to customary confidentiality assurances, all information regarding the KSSJ-FM Assets and the Optional ARS Station Assets customarily provided in a due diligence process, except such information that is subject to attorney-client privilege or attorney work-product privilege. Defendants shall make available such information to plaintiff at the same time that such

information is made available to any other person.

F. Defendants shall permit bona fide prospective purchasers of the KSSJ-FM Assets or the Optional ARS Station Assets to have access to personnel and to make such inspection of the assets, and any and all financial, operational or other documents and information, as is customary in a due diligence process.

G. Defendants shall not interfere with any efforts by any Acquirer to employ the general manager or any other employee of KSSJ-FM or the Optional ARS Station Assets.

V. APPOINTMENT OF TRUSTEE

A. In the event that defendants have not divested the KSSJ-FM Assets or the Optional ARS Station Assets within the time periods specified in Section IV of this Final Judgment, the Court shall appoint, on application of plaintiff, a trustee selected by plaintiff to effect the divestiture of the assets.

B. After the trustee's appointment has become effective, only the trustee shall have the right to sell the KSSJ-FM Assets or the Optional ARS Station Assets. The trustee shall have the power and authority to accomplish the divestiture at the best price then obtainable upon a reasonable effort by the trustee, subject to the provisions of Section V and VII of this Final Judgment and consistent with FCC regulation, and shall have such other powers as the Court shall deem appropriate. Subject to Section V (C) of this Final Judgment, the trustee shall have the power and authority to hire at the cost and expense of defendants any investment bankers, attorneys or other agents reasonably necessary in the judgment of the trustee to assist in the divestiture, and such professionals or agents shall be solely accountable to the trustee. The trustee shall have the power and authority to accomplish the divestiture at the earliest possible

time to a purchaser acceptable to plaintiff in its sole judgment, and shall have such other powers as this Court shall deem appropriate. Defendants shall not object to the sale of the KSSJ-FM Assets or the Optional ARS Station Assets by the trustee on any grounds other than the trustee's malfeasance. Any such objection by defendants must be conveyed in writing to plaintiff and the trustee no later than fifteen (15) calendar days after the trustee has provided the notice required under Section VII of this Final Judgment.

C. The trustee shall serve at the cost and expense of defendants, on such terms and conditions as the Court may prescribe, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining monies shall be paid to defendants, and the trustee's services shall then be terminated. The compensation of such trustee and of any professionals and agents retained by the trustee shall be reasonable in light of the value of the divestiture and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished.

D. Defendants shall take no action to interfere with or impede the trustee's accomplishment of the divestiture of the KSSJ-FM Assets or the Optional ARS Station Assets, and shall use their best efforts to assist the trustee in accomplishing the required divestiture, including best efforts to effect all necessary regulatory approvals. Subject to a customary confidentiality agreement, the trustee shall have full and complete access to the personnel, books, records and facilities related to the KSSJ-FM Assets and the Optional ARS Station Assets, and defendants shall develop such financial or other information as may be necessary for the

divestiture of the KSSJ-FM Assets and the Optional ARS Station Assets. Defendants shall permit prospective purchasers of the KSSJ-FM Assets and Optional ARS Station Assets to have access to personnel and to make such inspection of physical facilities and any and all financial, operational or other documents and information as may be relevant to the divestiture required by this Final Judgment.

E. After its appointment becomes effective, the trustee shall file monthly reports with defendants, plaintiff and the Court, setting forth the trustee's efforts to accomplish divestiture of the KSSJ-FM Assets and the Optional ARS Station Assets as contemplated under this Final Judgment, provided, however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the KSSJ-FM Assets or the Optional ARS Station Assets, and shall describe in detail each contact with any such person during that period. The trustee shall maintain full records of all efforts made to divest these assets.

F. Within six (6) months after its appointment has become effective, if the trustee has not accomplished the divestiture required by Section IV of this Final Judgment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations; provided, however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not

be filed in the public docket of the Court. The trustee shall at the same time furnish such reports to plaintiff and defendants, which shall each have the right to be heard and to make additional recommendations. The Court shall thereafter enter such orders as it shall deem appropriate to accomplish the purpose of this Final Judgment, which shall, if necessary, include extending the term of the trustee's appointment.

VI. PRESERVATION OF ASSETS/HOLD SEPARATE

Until the divestiture of the KSSJ-FM Assets required by Section IV of the Final Judgment has been accomplished:

A. Defendants shall take all steps necessary to operate KSSJ-FM as a separate, independent, ongoing, economically viable and active competitor to defendants' other stations in the Sacramento Area, and shall take all steps necessary to ensure that, except as necessary to comply with Section IV and paragraph B and C of this Section of the Final Judgment, the management of said station, including the performance of decision-making functions regarding marketing and pricing, will be kept separate and apart from, and not influenced by, defendants.

B. Defendants shall use all reasonable efforts to maintain and increase sales of advertising time by KSSJ-FM and the Optional ARS Station Assets, and shall maintain at 1996 or previously approved levels for 1997, whichever are higher, promotional advertising, sales, marketing and merchandising support for such radio station.

C. Defendants shall take all steps necessary to ensure that the assets used in the operation of KSSJ-FM and the Optional ARS Station Assets are fully maintained. KSSJ-FM's and the Optional ARS Station Asset's sales and marketing employees shall not be transferred or reassigned to any other station, except for transfer bids initiated by employees pursuant to

defendants' regular, established job posting policies, provided that defendants give plaintiff and Acquirer ten (10) days' notice of such transfer.

D. Defendants shall not, except as part of a divestiture approved by plaintiff, sell any KSSJ-FM Assets or the Optional ARS Station Assets.

E. Defendants shall take no action that would jeopardize the sale of the KSSJ-FM Assets or the Optional ARS Station Assets.

F. Defendants shall appoint a person or persons to oversee the assets to be held separate and who will be responsible for defendants' compliance with Section VI of this Final Judgment.

VII. NOTIFICATION

Within two (2) business days following execution of a binding agreement to divest, including all contemplated ancillary agreements (*e.g.*, financing), to effect any proposed divestiture pursuant to Sections IV or V of this Final Judgment, defendants or the trustee, whichever is then responsible for effecting the divestiture, shall notify plaintiff of the proposed divestiture. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed transaction and list the name, address and telephone number of each person not previously identified who offered to, or expressed an interest in or a desire to, acquire any ownership interest in the KSSJ-FM Assets or the Optional ARS Station Assets, together with full details of same. Within fifteen (15) calendar days of receipt by plaintiff of such notice, plaintiff may request from defendants, the proposed purchaser or purchasers, any other third party, or the trustee, if applicable, additional information concerning the proposed divestiture, the proposed purchaser, and any other potential purchaser. Defendants and the

trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after plaintiff has been provided the additional information, whichever is later, plaintiff shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If plaintiff fails to object within the period specified, or if plaintiff provides written notice to defendants and the trustee, if there is one, that it does not object, then the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Section V (B) of this Final Judgment. A divestiture proposed under Section IV shall not be consummated if plaintiff objects to it. Upon objection by plaintiff, or by defendants under the proviso in Section V (B), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VIII. FINANCING

Defendants are ordered and directed not to finance all or any part of any purchase by an Acquirer made pursuant to Sections IV or V of this Final Judgment without the prior written consent of plaintiff.

IX. AFFIDAVITS

A. Within twenty (20) calendar days of the filing of this Final Judgment and every thirty (30) calendar days thereafter until the divestiture has been completed, whether pursuant to Section IV or Section V of this Final Judgment, defendants shall deliver to plaintiff an affidavit as to the fact and manner of defendants' compliance with Section IV or V of this Final Judgment. Each such affidavit shall include, inter alia, the name, address and telephone number of each person who, at any time after the period covered by the last such report, was contacted by

defendants, or their representatives, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or made an inquiry about acquiring, any interest in the KSSJ-FM Assets or the Optional ARS Station Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts that defendants have taken to solicit a buyer for the KSSJ-FM Assets or the Optional ARS Station Assets.

B. Within twenty (20) calendar days of the filing of this Final Judgment, defendants shall deliver to plaintiff an affidavit which describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an on-going basis to preserve KSSJ-FM or the Optional ARS Station Assets pursuant to Section VI of this Final Judgment. Defendants shall deliver to plaintiff an affidavit describing any changes to the efforts and actions outlined in their earlier affidavit(s) filed pursuant to this Section within fifteen (15) calendar days after such change is implemented.

C. Defendants shall preserve all records of all efforts made to preserve and divest the KSSJ-FM Assets and the Optional ARS Station Assets.

X. NOTICE

A. Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the “HSR Act”), defendants, without providing advance notification to the plaintiff, shall not directly or indirectly acquire any assets of or any interest, including any financial, security, loan, equity or management interest, in any Non-ARS Radio Station.

B. Defendants, without providing advance notification to the plaintiff, shall not

directly or indirectly enter into any agreement or understanding that would allow defendants to market or sell advertising time or to establish advertising prices for any Non-ARS Radio Station.

C. Notification described in (A) and (B) above shall be provided to the United States Department of Justice in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5-9 of the instructions must be provided only with respect to ARS Radio Stations in the Sacramento Area. Notification shall be provided at least thirty (30) days prior to acquiring any such interest covered in (A) or (B) above, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the plaintiff make a written request for additional information, defendants shall not consummate the proposed transaction or agreement until twenty (20) days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder.

D. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

XI. COMPLIANCE INSPECTION

For the purpose of determining or securing compliance with the Final Judgment and subject to any legally recognized privilege, from time to time:

A. Duly authorized representatives of the plaintiff, including consultants and other persons retained by the plaintiff, shall, upon written request of the United States Attorney General, or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants made to their principal offices, be permitted:

(1) Access during office hours of defendants to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of defendants, who may have counsel present, relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of defendants and without restraint or interference from defendants, to interview directors, officers, employees and agents of defendants, who may have counsel present, regarding any such matters.

B. Upon the written request of the United States Attorney General, or of the Assistant Attorney General in charge of the Antitrust Division, made to defendants' principal offices, defendants shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in Section IX or this Section XI shall be divulged by any representative of the United States to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which plaintiff is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by a defendant to plaintiff, and such defendant represents and identifies in writing the material in any such information or

documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and such defendant marks each pertinent page of such material, “Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,” then ten (10) calendar days’ notice shall be given by plaintiff to such defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which such defendant is not a party.

XII. RETENTION OF JURISDICTION

Jurisdiction is retained by this Court at any time for such further orders and directions as may be necessary or appropriate for the construction, implementation or modification of any provisions of this Final Judgment, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

XIII. TERMINATION

Unless this Court grants an extension, this Final Judgment will expire upon the tenth anniversary of the date of its entry.

XIV. PUBLIC INTEREST

Entry of this Final Judgment is in the public interest.

Dated _____

United States District Judge

CERTIFICATE of SERVICE

I, Dando B. Cellini, hereby certify that, on February, 27, 1997, I caused the foregoing documents to be served on defendants American Radio Systems Corporation and EZ Communications, Inc. by having a copy mailed, first-class, postage prepaid, to:

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_____/s/_____
Dando B. Cellini